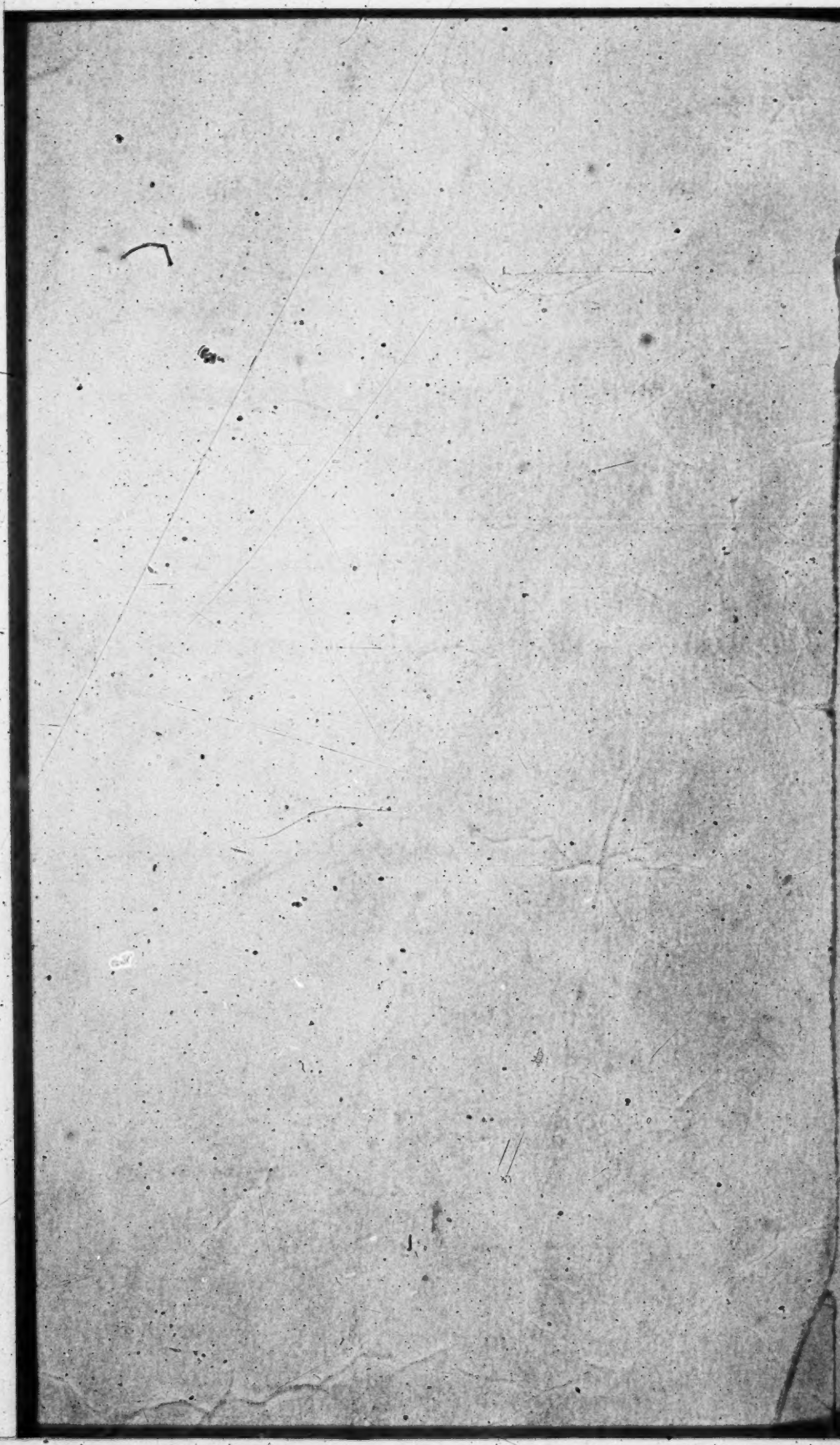

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
vs.
HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, et al., Etc.,
Appellees.
No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S REPLY BRIEF.

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Allegations of Complaint.

Appellees, in their reply brief (pp. 3-5), state that the appellant has confused allegations of the petition with statements to be found in the affidavits and not in the bill of complaint.

Appellees admit, however, that the petition did contain the allegations that, since the enactment of the Arkansas Full Crew and Full Switching Crew Laws, the appellant's

> "road and equipment is now heavier and stronger and safer; that freight trains 'containing many more cars than those which could be safely operated when said laws were enacted can now be operated in Arkansas, and throughout the United States generally, much more safely than smaller trains could then be operated'; that additions and betterments have been made for the express purpose of increasing efficiency and safety 'in the running of longer and heavier freight and passenger trains' ";

and that

> "it is standard practice, wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen and extra brakemen provided by the Arkansas laws" (Appellees' Brief, pp. 3 and 4).

Clearly, under the authorities cited, these facts, upon which appellant predicated the conclusion that its rights under the Transportation Act, the Federal Railroad Labor Act of 1926 and the Constitution of the United States were violated, would be admitted by the appellees' motion to dismiss, and, hence, it was error for the three-judge Court to sustain said motion.

In passing, the three-judge Court held against the appellees upon the contention that this was a suit against the State of Arkansas in contravention of the Eleventh Amendment; that the complainant had an adequate remedy at law, and that it was necessary in the first instance to appeal to the Interstate Commerce Commission before filing this bill in court. Notwithstanding this fact, however, appellees have again raised these points before this court.

Appellees also contend that the decisions of this Court (**C. R. I. & P. v. Arkansas, 219 U. S. 453**, and **St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518**), upholding the validity of the Arkansas Full Crew Law and the Arkansas Full Switching Crew Law, were res adjudicata and conclusive upon the three-judge Court, although the Transportation Act was not in effect when these decisions were rendered.

For the first time, in 1920, Congress, in the Car Service Section of the Interstate Commerce Act, granted to the Interstate Commerce Commission **jurisdiction to regulate the supply of trains.** Since this grant of power the Interstate Commerce Commission has held that it had exclusive jurisdiction "to regulate the supply of trains," and neither this grant of power nor the exercise thereof by the Interstate Commerce Commission existed or had been exercised until after these decisions.

In re Train Service on Northern Pacific, 112 I. C. C. 191.

Three-Judge Court Erred in Sustaining the Motion to Dismiss.

In Postal Telegraph Cable Co. v. Newport (247 U. S. 464), after the telegraph company, under authority of an ordinance of the City of Newport, Kentucky, had erected its poles and wires over the streets and alleys of that city, upon the nonpayment of certain taxes, suit was filed by the city to recover the license taxes, and judgment was rendered for the city, notwithstanding the allegation of certain facts set up by the defendant and rights based upon the provisions of the Constitution of the United States, and its contention that the ordinance, in imposing such taxes, violated the commerce clause of the Constitution and the establishment of post offices and post roads, and denied to it the equal protection of the law in violation of the Fourteenth Amendment.

The case was decided in the trial court upon the pleadings and exhibits, which later included a copy of the ordinance.

In deciding the case the Court of Appeals of Kentucky (160 Ky. 244) ignored the facts alleged as a basis for the contention that the telegraph company had been denied the benefit of the state and federal Constitutions, and decided in favor of the city.

Mr. Justice Pitney, for this Court, said:

> "But the question arises whether the basis of fact upon which the state court rested its decision denying

the asserted federal rights has any support in the record, for, if not, it is our duty to review and correct the error."

Sou. Pac. v. Schuyler, 227 U. S. 601;
N. Car. v. Zachary, 232 U. S. 248;
Carlson v. Curtis, 234 U. S. 103;
Norfolk & Western R. Co. v. W. Va., 236 U. S. 605.

Proceeding to hold that it was error to thus ignore the facts alleged upon which the constitutional right was predicated, this Court said:

"Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it and erected its poles and strung its wires in the streets of the city under another and independent claim of right, as plaintiff well knew, and other averments bearing upon the question of acceptance in fact."

Postal Telegraph Cable Co. v. Newport, 247 U. S. 474.

And see:

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction case, 264 U. S. 262.

State Full-Crew Laws.

In the brief for appellees the statement is made that the Arkansas law is **"not an exceptional law,"** but that the object of the appellant's bill is to bring about an annulment by judicial action of **"state legislation enacted and sustained under the police power to protect the public safety and welfare"** (Appellees' Brief, p. 2).

That there is no uniformity or consistency in the state legislation regarding "Full-Crew Laws" will be evident from a perusal of the state laws upon the subject which are collated in the appendix to the appellees' brief (pp. 88 to 93).

Full-Crew Legislation.

Counsel for appellees refer to the number of states that have adopted full-crew legislation since the decision of this Court upholding the Arkansas Full-Crew Law.

This Court will take judicial notice of the history of state legislation regarding extra brakemen on freight trains in the United States. The following is a brief history of such legislation:

Brief History of State Full-Crew Legislation.

During the years 1911 to 1914, after the decision of the Supreme Court of the United States in C. R. I. & P. v. Arkansas, 219 U. S. 453, upholding the Arkansas Full-Crew Law, a wave of full-crew legislation swept over the

country, and by the end of 1914 such laws in one form or another appeared on the statute books of twenty-one states.

In some states the Public Utilities Commission was authorized to prescribe the number of employes, and in others five employes, that is, two brakemen only, were required. In certain other states, however, three brakemen were required on trains of varying length.

A list of such states and the minimum number of cars to which the requirement applied is as follows:

Arkansas, New York and Washington	25 cars or more
Maryland, New Jersey and Pennsylvania	30 cars or more
Arizona and Oregon	40 cars or more
North Dakota	46 cars or more
California, Nevada and Indiana	50 cars or more

In North Dakota one additional brakeman was required for every 10 cars or fraction thereof over 45 cars.

In California the number of additional brakemen required on trains of 50 cars or over was dependent on a combination of the number of cars over 50 and the maximum grade of the track over which the trains were operated.

Attempts were also made and are still being made to enact such laws in a large number of other states, but no such law has been enacted since 1914. The Indiana and

Pennsylvania laws were repealed in 1921 and in 1922 the Maryland and New Jersey laws were repealed.

The Missouri Legislature passed a full-crew law in 1913, but the same was overwhelmingly defeated on a referendum at the general election held in November of the next year.

In Connecticut the Legislature referred proposed full-crew legislation to the Public Utilities Commission for investigation and report, and the Commission, in 1914, reported against the proposed law.

Governor Cruce of Oklahoma vetoed the law passed by the Legislature of that state in 1913, and Governor Foss of Massachusetts took the same action in 1912.

Accident Bulletin No. 97 for the year 1928, published by the Interstate Commerce Commission, shows the following figures with reference to man hours worked by conductors and trainmen (brakemen and flagmen) on through and local freight trains:

	Conductors	Trainmen
Local freight trains	28,109,000	67,925,000
Through freight trains	36,580,000	77,510,000

This shows that for every conductor there are about 2.1 trainmen on through freight trains and on local freight trains there are about 2.4 trainmen for each conductor. It thus appears that the standard crew on freight trains consists of a conductor and two trainmen except in localities where state laws require an extra brakeman on through

freight trains and in cases in which a third man is required to assist in loading and unloading less-than-carload freight on local trains in territory where a third man is not required by law to be used.

Plaintiff Has No Adequate Remedy at Law.

The case of

Ex Parte Young, 209 U. S. 123,

and cases following it are direct authorities upon the proposition that an action, such as the plaintiff's, will lie to restrain the enforcement of a void state law, because the state procedure, of defending such statutes and appealing through the state courts, and then attempting to take the case to the United States Supreme Court, is not an adequate remedy.

In

Ex Parte Young, 209 U. S. 163,

the Supreme Court said:

> "It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But, in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an

inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

The statutes involved in the **Young** case provided for both fine and imprisonment, and the Court went on to observe that it might be difficult to find some agent who would want to run the risk of imprisonment, and then continued:

"If, however, one should be found and the prosecutor should elect to proceed against him, **the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter.** * * * We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (**St. Louis & G. Ry. Co. v. Gill, 156 U. S. 649**), but **the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.**"

In

Risty v. C. R. I. & P. Ry. Co., 297 Fed. 710,

it was also contended that the plaintiff had an adequate remedy in the state courts and that, for this reason, jurisdiction should not be entertained; but the United States Circuit Court of Appeals for the Eighth Circuit, in disposing of this contention, said:

> "Appellants challenge the jurisdiction of the Court, claiming there was a plain, adequate and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.
>
> "It is fundamental that equity cannot give relief where there is a plain, adequate and complete remedy at law. It is provided by the Federal Judicial Code, Compiled Stat. 1918, Sec. 1244, as follows: 'Suits in Equity—Suits in equity shall not be "sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law (R. S., Sec. 723, March 3, 1911, c. 231, Sec. 267, 36 Stat. 1163)." It must be a remedy as certain, complete, prompt and efficient to attain the ends of justice as that in equity' (citing authorities).
>
> **"It must be a remedy on the law side of the federal court.** A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy (citing authorities). The question is: **Has the party adequate remedy at law in the federal court?"**

The judgment of the Circuit Court of Appeals for the Eighth Circuit in that case was reviewed by the Supreme Court in 270 U. S. 328, where the Supreme Court said:

> "The remedy by appeal to a state court * * * does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

To the same effect was the case of

Franklin v. Nevada-California Power Co.
264 Fed. 843,

where the Circuit Court of Appeals for the Ninth Circuit said:

> "The adequate remedy at law, which is the test of equitable jurisdiction in the federal courts, must exist in those courts. The fact of the existence of such a remedy in a state court is immaterial."

Plaintiff Does Not Have to Exhaust the State Procedure by Appealing From Prosecutions in the Justices' Courts Through the Different Courts of the State of Arkansas to the Supreme Court Before Resorting to a Federal Court of Equity.

The second ground of the motion to dismiss is that plaintiff cannot enjoin the enforcement of the criminal statutes of the State of Arkansas without first exhausting its remedy by appeal under the state practice.

The same contention was made in the recent case of

Hill City Ry. Co. v. Youngquist, Attorney-General of Minnesota, 32 Fed. (2d) 821,

where Circuit Judges Booth, Cant and Sanborn, in a per curiam opinion, thus replied to this contention:

> "Another point raised by the motion is that the complaint shows that plaintiff has an adequate remedy at law. **The adequate remedy at law must be in the federal court. None is pointed out and, in our opinion, none such exists.**"

In the **Hill City** case the railroad company had appealed from an order of the Railroad and Warehouse Commission to the State District Court, and it was contended that the federal court should not grant an injunction restraining the enforcement of the statute until this appeal had been finally disposed of. In answering this contention the Court for the Eighth Judicial Circuit said:

> "Finally, the point is made that an appeal has been taken by the plaintiff company from the order of the Railroad and Warehouse Commission to the State District Court, and that, by doing so, plaintiff company has estopped itself from bringing the present suit in the federal court."

The Court held that by appealing from the order of the Railroad and Warehouse Commission there was no estoppel against the plaintiff from the prosecution of its suit in the federal court.

In

Union Light & Power Co. v. Railroad Commission,
17 Fed. (2) 146,

the defendants contended that the plaintiff would have to continue to prosecute its appeal from a case pending to enforce the statute in the Circuit Court of Campbell County, Kentucky. Upon this contention the Court said:

> "We cannot agree with defendant's contention that this Court, under Section 266 of the Judicial Code, has no authority to proceed further until a suit now pending in the Campbell County (Kentucky) Circuit Court, which was instituted by the Railroad Commission to enforce the orders complained of herein, has been finally determined."
>
> • • • • • • •
>
> "The section in question, however, grants to any of the judges authorized to sit in such case the power to grant, without notice or hearing, a temporary restraining order at any time before the hearing and determination of the application for an interlocutory injunction."
>
> • • • • • • •
>
> "We, therefore, hold that the action brought by the defendants in the Campbell Circuit Court, and the order entered therein, in nowise affects the power or the duty of this Court to now proceed to a final determination of the application for an interlocutory injunction herein."

17 Fed. (2d) 147.

In

Franklin v. Nevada-California Power Co.,
264 Fed. 643,

the Court held that an adequate remedy at law, which was the test of equitable jurisdiction in the federal courts, must exist in those courts, and the fact that there might have been some other remedy in the state courts was immaterial.

In

Risty v. C. R. I. & P. Co., 297 Fed. 710,

the Circuit Court of Appeals for the Eighth Circuit said:

> "It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. * * * The question is: Has the party the adequate remedy at law in the federal court?"

In the **Risty** case the United States Supreme Court reviewed the judgment of the Court of Appeals for the Eighth Circuit and said:

> "The remedy by appeal to a state court, under section 8469, does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law

side of that court, and not the inadequacies of the remedies afforded by the state courts."

270 U. S. 328.

This same contention is answered in the **Young** case, supra, where the Supreme Court said:

"Several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

209 U. S. 163.

See, also:

St. Louis etc. Ry. Co. v. Gill, 156 U. S. 649.

That this is not a suit against the State of Arkansas, in violation of the Eleventh Amendment, should be apparent under the decisions of this and other courts.

This Is Not a Suit Against the State of Arkansas.

The defendants, in their motion to dismiss the complaint, assert that this action is against the State of Arkansas, in violation of the Eleventh Amendment to the Constitution of the United States, which prevents any suit in law or in equity against one of the United States by citizens of another state.

The same contention was made by a motion to dismiss in the recent case of

Hill City Ry. Co. v. Youngquist, Attorney-General of Minnesota et al., 32 Fed. (2d) 819.

The Attorney-General, in that case, filed a motion to dismiss, which was heard by Circuit Judge Booth and District Judges Cant and Sanborn, and the Court, in a per curiam opinion, answered the same propositions advanced by the defendants in this case, as follows:

"We think that these contentions, under the motion to dismiss, are based upon a misconception of the bill of complaint. The gist of the bill is that the sections of the Minnesota statute above cited, together with the order of the Railroad and Warehouse Commission, as construed by the state officials, defendants herein, are violative of the rights of plaintiff secured by the Fourteenth Amendment, as properly construed, and that the threatened action by defendants against plaintiff are also violative of plaintiff's rights under such amendment. It is clear that a federal question or federal questions are thus presented. * * * The United States District Court, accordingly, has jurisdiction."

Hill City Ry. Co. v. Youngquist, 32 Fed. (2d) 821;
Ex Parte Young, 209 U. S. 123;
Siler v. L. & N. R. R. Co., 213 U. S. 175;
Washington ex rel. v. Fairchild, 224 U. S. 510;
Railroad Commission v. Eastern Texas Ry. Co., 264 U. S. 79;
Brownwood etc. Ry. Co. v. Commission (D. C.), 16 Fed. (2d) 297.

See, also,

Union Light & Power Co. v. R. R. Comm'n of Kentucky, 17 Fed. (2d) 143,

and cases cited.

In

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 66,

the contention was made that the Circuit Court of Mississippi had no jurisdiction to issue the injunction, but the Supreme Court, speaking through Justice Shiras, said:

> "We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the recent case of

White v. Federal Radio Commission et al., 29 Fed. (2d) 113,

where the plaintiff sought an injunction against the en-

forcement of an order of the Federal Radio Commission on the ground that the Radio Act of 1927 was unconstitutional, upon a motion to dismiss because the suit, in effect, was one against the United States, Judge Wilkerson, speaking for the Court for the Northern District of Illinois, said:

> "In a strict sense the Court, in this case, has jurisdiction. It has power to grant an injunction, and if one is granted, its decree, even though it may be erroneous, would not be void. The motion of the defendants to dismiss for want of jurisdiction in equity will be overruled.
>
> "It is no longer open to denial that the averments of the unconstitutionality of the statute, which are relied upon, if well founded, justify equitable relief under the bill."

Kennington v. Palmer, 255 U. S. 100;
Adams v. Tanner, 244 U. S. 590;
Hammer v. Dagenhart, 247 U. S. 251;
Hamilton v. Kentucky Distilleries, 251 U. S. 146;
Ruppert v. Caffey, 251 U. S. 264;
Ft. Smith & Western R. R. Co. v. Mills, 253 U. S. 206.

In

Pennsylvania v. West Virginia, and Ohio v. West Virginia, 262 U. S. 553,

a statute of West Virginia provided that persons engaged in furnishing natural gas must furnish all the gas the do-

mestic consumers were ready to pay for before transporting it by pipe line to other states.

It was alleged that the Corporation Commission would order a physical connection for domestic consumers, and that a company failing to furnish such gas would be subject to the penalties provided by the act.

The Supreme Court held that the statute was void, and granted the injunction to relieve against the penalties provided for its violation.

Since the leading case of

Ex Parte Young, 209 U. S. 124,

it has been generally recognized that the Attorney-General could not claim exemption, when he was attempting to enforce a void statute, by hiding behind the Eleventh Amendment to the Federal Constitution. In that case Edward T. Young, Attorney-General of the State of Minnesota, was attempting to enforce the minimum-rate statutes of the State of Minnesota, and the United States Circuit Court enjoined him and the Railroad Commission from proceeding to enforce the Minnesota law.

He appeared specially and only for the purpose of moving to dismiss the bill against him on the ground that the Court had no jurisdiction over him, as Attorney-General; that the State of Minnesota had not consented, and did not consent, to the commencement of the suit, and that the suit was, in fact, a suit against the State of Minnesota,

contrary to the Eleventh Amendment to the Constitution of the United States.

Upon hearing, the Circuit Court of Minnesota enjoined Young, pending the final hearing of the case, from taking or instituting any action or proceeding to enforce the penalties provided by statute.

The Attorney-General proceeded to procure mandamus in the state court the day after the granting of the preliminary injunction, and he was then cited for contempt of the federal court. He set up the same defenses in his answer and claimed that the State of Minnesota was exempt from the suit under the Eleventh Amendment to the Constitution of the United States.

Mr. Justice Peckham, in the **Young** case, reviewed the authorities at length, and came to the conclusion that the action in that case was not a suit against the state in its sovereign capacity, but was against the defendants, who were wrongfully attempting to enforce a void statute. In the course of the opinion Justice Peckham, speaking for the Court, said:

> "In **Virginia Coupon Cases**, 114 U. S. 270, 296 **(Poindexter v. Greenhow)**, it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes and, under color of a void law, was about to seize and sell the property of a taxpayer for nonpayment of his taxes, was a suit against him personally, as a wrongdoer, and not against the state."

* * * * * * *

"In **Pennoyer v. McConnaughy**, 140 U. S. 1, 9, a suit against land commissioners of the state, was said not to be against the state, although the complainants sought to restrain defendants, officials of the state, from violating, under an unconstitutional act, the complainants' contract with the state, and thereby working irreparable damage to the property rights of the complainants. **Osborn v. United States Bank**, supra, was cited, and it was stated:

"'But the general doctrine of **Osborn v. Bank of the United States**, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when, to execute it, would violate rights and privileges of the complainant, which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.'

"The same principle is decided in **Scott v. Donald**, 165 U. S. 58, 67. And see **Missouri etc. v. Missouri Railroad Commission**, 183 U. S. 53.

* * * * * * *

"In **Smyth v. Ames**, 169 U. S. 466 (another rate case), it was again held that a suit against individuals for the purpose of preventing them, as officers of the state, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against the state within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the state, it was said:

"'It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing

them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the amendment.' * * *

"* * * This decision was reaffirmed in **Prout v. Starr**, 188 U. S. 537, 542."

* * * * * * *

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the federal Constitution, may be enjoined by a federal court of equity from such action."

209 U. S. 151 to 158.

In the **Young** case, the Attorney-General also contended that it was not his specific duty to enforce the statute and that, therefore, he should not have been made a party defendant. Upon this question the Court said:

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not

affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official, in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the State Attorney-General seeks to enforce be a violation of the federal Constitution, the officer, in proceeding under such enactment, comes into contact with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (See **In re Ayres**, supra, p. 507.) It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution, be first raised in a federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts."

Ex parte Young, 209 U. S., l. c. 159, 160.

The **Young** case is followed in

Cline v. Frink Dairy Co., 274 U. S. 446,

where Mr. Chief Justice Taft held that:

"The general rule is that a federal court of equity may enjoin state criminal proceedings under a statute alleged to be unconstitutional when their prevention is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate."

In addition to the **Young** case, the Court cites:

Fenner v. Boykin, 271 U. S. 240;
Packard v. Banton, 264 U. S. 140;
In re Sawyer, 124 U. S. 200.

The **Young** case is again followed in the recent case of

Liggett v. Baldridge, Attorney-General of Pennsylvania, 278 U. S. 106,

where an injunction against the Attorney-General was held to be authorized, to prevent him from enforcing the Pennsylvania statute forbidding any corporation to own a pharmacy or drug store, in addition to those owned at the time of its enactment, unless all of its stockholders were licensed pharmacists.

Replying to the contention that this was a suit against the state which could not be maintained Mr. Justice Sutherland, for the Supreme Court, said:

"It further appears that the State Attorney-General and the District Attorney of the proper county have

threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative."

Appellees also raised the question that, before invoking the jurisdiction of the courts, appellant must, as a condition precedent, invoke the jurisdiction of the Interstate Commerce Commission.

Where Congress Occupies Field Not Necessary for Commission to Act.

In

Missouri Pacific v. Porter et al.
(273 U. S. 342)

the question decided was whether the subject of regulating the provisions of bills of lading had been acted upon by the Commission in pursuance to the Act to Regulate Commerce. It was admitted that the Commission had not prescribed the form of the bill of lading, but, because Congress had occupied the field, this excluded all state authority, although the Commission had not prescribed the form, the Court, through Mr. Justice Butler, saying:

"The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a nonadjacent foreign country.

* * * No Act of Congress or order of the Commission prescribed a form of bill of lading for this shipment. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment or section 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section I (in paragraph 6) extends to all carriers and to all transportation subject to the act * * *. And the Commission is empowered and directed to enforce the rule.

"* * * Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme, and, as that power has been exerted, state laws have no application. They cannot be applied, in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Napier v. Ry. Co., 272 U. S. 605;
Pennsylvania Co. v. Pub. Serv. Com., 250 U. S. 566;
R. R. Co. v. Varnville Co., 237 U. S. 597;
Prigg v. Pennsylvania, 16 Pet. 539;
Houston v. Moore, 5 Wheat. I, 21, 22;
C. R. I. & P. Ry. Co. v. Elevator Co., 226 U. S. 426, 435.

In the case of

Midland Valley R. R. Co. v. Barkley et al.
(48 Sup. Ct. Rep. 342)

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded.

In deciding that case Mr. Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was **no order of the Commission** which required the Midland to distribute all available open-top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * **The reasonableness of the rule adopted by the carrier is a matter for the Commission.**"

Appellees also contend that the decisions of this Court, upholding the Arkansas Full-Crew and Full-Switching-Crew Laws, prevent this Court from now reviewing the subject, notwithstanding Congress had not then occupied the field.

The Decisions of This Court Upholding the Arkansas Full-Crew and Full-Switching Crew Laws.

The motion to dismiss is also predicated upon the fact that the United States Supreme Court has upheld the Full-Switching-Crew Law and the Extra-Brakeman Act, and that those decisions are controlling upon the Court.

The plea of former adjudication must be specially pleaded to the merits and cannot be raised by motion to dismiss.

In

Fayerweather v. Ritch, 195 U. S. 276,

speaking of the plea of former adjudication, Mr. Justice Brewer, for the Supreme Court, said:

> "Whether the contention of the plaintiffs in respect to the character of the state proceeding can be sustained or not **is a question upon the merits**, and does not determine the matter of jurisdiction. * * * But, in order to make this finality rightful, it should appear that the question was distinctly put in issue; that the parties presented their evidence, or, at least, had an opportunity to present it, and that the question was decided."

Since the decisions of the United States Supreme Court upholding the validity of the Arkansas Full-Crew Laws in

C. R. I. & P. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. v. Arkansas, 240 U. S. 518,

Congress has occupied the field, and the reasoning and legal effect of the decisions of the Supreme Court, and the power of the state over the subject matter, have been effectually superseded.

Section 1 grants the Commission power to regulate "the supply of trains," and Section 13 of the Act to Regulate Commerce, as amended February 28, 1920, gives the Interstate Commerce Commission complete jurisdiction to prescribe the "rate, fare, charge, classification, regulation **or practice**," which must be adopted by interstate carriers; and the Commission, after hearing, if it finds that "any such rate, fare, charge, classification, regulation **or practice**" causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, "shall prescribe the rate, fare or charge * * * and the classification, regulation **or practice** thereafter to be observed in such manner as, in its judgment, will remove such advantages, preference, prejudice or discrimination, * * * **the law of any state or the decision or order of any state authority to the contrary notwithstanding.**"

This section of the Transportation Act—which was not in existence when the constitutionality of the Full-Crew Laws was upheld by the Supreme Court—clearly shows

that Congress, since these decisions, has occupied the field, thus nullifying the state power upon this subject.

Railroad Commission v. Southern Pacific et al., 264 U. S. 332, 34 Fed. (2d) 228.

By Section 15 of the Act to Regulate Commerce, as amended February 28, 1920, the Interstate Commerce Commission is given complete authority to determine rates, classifications, regulations and **practices**, and the Commission is given authority to prescribe what will be "a just and reasonable rate, fare or charge to be thereafter observed," and what "individual or joint classification, regulation or **practice** is, or will be, just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist," and the carriers "shall adopt the classification and shall conform to and observe the regulation or **practice** so prescribed."

By these sections the Commission is given authority not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with **proper, efficient operation and economical management.** If the Interstate Commerce Commission has authority to prescribe the rates and to regulate the expenditures, then the State of Arkansas, or any other individual state, cannot uselessly require, under the guise of the

police power, an annual expenditure by one of the carriers of this state of the sum of $800,000, which is not required by any other of the eight states through which the petitioner operates, for compliance with the so-called Full-Crew Laws. Not only has Congress legislated on this subject matter by the Transportation Act of 1920, but also by the Railroad Labor Act approved May 20, 1926, it has also occupied this field.

Congress has legislated upon the complete subject of railway labor by providing for a board of mediation and an emergency board, if necessary, to determine all disputes and issues between railroad employes and the common carriers of this country.

The Railroad Labor Act provides that it shall be the duty of carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes. Conferences are provided for "in case of a dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions."

Congress, by the Railroad Labor Act, has given the Railroad Labor Board jurisdiction, when called upon, to determine any and all disputes, and not only to prescribe reasonable rules, but also to determine what are proper "**working conditions**" between railroad employes and common carriers.

That the Transportation Act supersedes the police power of the state has been squarely held by the courts of our country.

The spirit and intent of the Transportation Act of 1920 was thoroughly explained by Presiding Judge Stone in the case of

M.-K.-T. R. Co. v. Northern Oklahoma Rys.,
25 Fed. (2d) 690,

as follows:

> "Probably the most important novel features of the act are the provisions designed to build up such an adequate system of railways. Those provisions have to do with railway capitalization, loans, consolidations, support of weak roads, common use of terminals, distribution of equipment and other matters. * * * It applies to all mileage 'used in interstate commerce.'"

There is an exhaustive array of decisions interpreting the Transportation Act, collated by Judge Stone in this case, and, in concluding the opinion of the Court it is said:

> "Since a portion of the traffic which this new road will transport is interstate traffic; since a railroad which takes any part in transporting interstate traffic is an instrument of interstate commerce; since 'the authority of Congress extends to every part of interstate commerce, and to every instrumentality or

agency by which it is carried on,' * * * this road could not be constructed without compliance with that statutory provision."

* * * * * * *

"Because we think this case is determined by the fact that this road would (because of the character of the traffic to be handled) be an interstate carrier, we find it unnecessary to determine or examine the further contention by appellant that the Constitution of Oklahoma (Article IX, Section 3) would compel this road to carry all freight offered it, and, therefore, could not avoid being an interstate carrier."

The decisions upholding the Arkansas Extra Brakeman and Extra Switchman Acts,

C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518,

were handed down, respectively, February 20, 1911, and April 3, 1916.

This was several years before the Transportation Act of 1920, which this now holds was intended to, and did, occupy the entire field of regulation of interstate carriers. No contention was made in the above cases that Congress had then acted upon the subject.

The provision of the Arkansas Extra Brakeman Law, that the law should not apply **"where said freight train, so operated, shall consist of less than twenty-five cars,"** in view of the modern improvements and methods of rail-

roading, is so archaic and unreasonable that, upon this ground, alone, in view of the provisions of the Transportation Act and the improvement in railroad practices and safety measures since those decisions were rendered, should clearly distinguish those decisions; but the Court, in those cases, has, itself, drawn the distinction between the conditions then existing and those now obtaining. Mr. Justice Harlan, in the **Rock Island** case (219 U. S. 453), uses the following language:

> "Under the evidence, there is admittedly some room for controversy as to whether the statute is, or was, necessary; but it cannot be said that this was so unreasonable as to justify the Court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which, evidently, the State Legislature had in view. It is the means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts if they have a real relation to that object."
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> "Undoubtedly, Congress, in its discretion, may take charge of the whole subject of the equipment of interstate cars and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce; **but it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations upon that subject, and, until it does, the statutes of**

> **the states, not in their nature arbitrary, and which really relate to the rights and duties of all within its jurisdiction, must control**" (219 U. S. 466).

In other words, the very condition which was absent at the time that the above decision was rendered, i. e., the fact that Congress had not taken "**entire charge of the whole subject,**" does exist at the present time.

Congress has now legislated upon the whole field and delegated to one central body, outside the State of Arkansas, the regulation of "**the whole subject of the equipment of interstate cars,**" and, by doing so, according to the decision of Mr. Justice Harlan in the **Rock Island** case, the power of the state to legislate upon the same subject terminated.

If a given state, since the Transportation Act, can adopt regulations affecting freight trains transporting interstate commerce and containing over twenty-five cars, then it can impose such regulations upon trains containing five or ten cars, and this would be just as reasonable as the present regulation which affects trains of twenty-five cars.

In the **Iron Mountain** case (240 U. S. 518), wherein the Supreme Court upheld the Arkansas Full-Switching-Crew Law, speaking through Mr. Justice McKenna, the Court said, referring to the previous **Rock Island** case, upholding the validity of the Extra-Brakeman Act:

> "In that case, as in this, there was controversy in the testimony and the contentions of the parties as to

the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power."

* * * * * * *

"A more serious objection is that certain terminal companies, one at the City of Helena and one at Fort Smith, do switching for certain connecting trunk lines, and yet, by reason of their length being less than one hundred miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary, if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary.

"We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will, as a whole, fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant" (240 U. S. 521).

As said by Mr. Justice Harlan, in the **Rock Island** case:

"Undoubtedly Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars."

Since those decisions were rendered Congress **has** done so. The subsequent action of Congress completely removes the reasons upon which these decisions are based. The supreme legislative power had not acted upon the subject

upon which the subordinate legislative power had legislated when those decisions were rendered.

The height of oppression, which the rigor of the Arkansas statutes resulted in, may have been one reason which prompted Congress to take over the subject matter and provide for the more reasonable rule which now obtains.

In any event, the condition confronting the Court, when these decisions were rendered, no longer obtains, and, exit the reason therefor, those decisions should not longer be held controlling upon the courts.

The Railroad Labor Act of 1926.

Appellees, in their brief, contend that

> "the Railway Labor Act has no possible effect upon the exercise of state police power" (p. 63),

yet appellees admit that the Railway Labor Act of 1926 provides that

> "it is the duty of carriers and employes to make and maintain agreements concerning rates of pay, rules and working conditions" (Appellees' Brief, p. 63).

Appellees contend that, necessarily, the agreements contemplated by the Federal Act are subject to

> "state statutes passed in the exercise of police power" (Appellees' Brief, p. 64).

Arkansas Statutes in Conflict With Railroad Labor Act of 1926.

Appellees contend that the Arkansas Full-Crew Statutes, sought to be enjoined in this case, are not in conflict with the spirit and intent of the Federal Railroad Labor Act of 1926.

By the Federal Railroad Labor Act, Congress made it the duty of carriers and their employes to exert every reasonable effort to make and maintain agreements concerning rules and working conditions, and by the affidavits of the appellant filed in this case, agreements have been made and are in force on the Missouri Pacific Railroad and other roads providing for operation of freight trains with but two brakemen and of switch engines with a less number of switchmen than are required by the Arkansas laws in all the other states in which the Missouri Pacific operates, except the State of Arkansas.

Clearly, by preventing the making of such contracts with its employes in the State of Arkansas, these statutes prevent the Railroad Company and its employes from entering into agreements as directed by the Federal Railroad Labor Act of 1926, in the State of Arkansas.

If the State of Arkansas can thus prevent the making of contracts between interstate carriers by railroad and employes regarding "rules and working conditions," then, by the same token, the state can abrogate such contracts, when made, and thus prevent the enforcement of the Fed-

eral Railroad Labor Act of 1926; and the Legislature of Arkansas, with equal force, could provide that no agreements touching "rules and working conditions" should be effective unless approved by the Railroad Commission of the State of Arkansas or some other state authority.

Arkansas Laws Violate Spirit and Intent of Federal Safety Appliance Acts.

By the Federal Safety Appliance Acts and the authority delegated to the Interstate Commerce Commission thereunder provision is made for the control of the speed of trains by forbidding the use of any locomotive not equipped with power-driven wheel brakes and appliances for operating the train-brake system, and railroads are forbidden to run any train that has not a sufficient number of cars equipped with power or train brakes, so that the engineer on a locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brakes for that purpose. It is a fact, of which this Court will take judicial notice and affirmed by the affidavits filed herein, that the report of the Bureau of Safety of the Interstate Commerce Commission shows that over 99 per cent of the cars and trains tested by the Commission's inspectors were controlled by air brakes. All the improvements, the petition alleges, in equipment and roadbed have occurred since the decisions of this Court upholding the validity of the Arkansas statutes as police regulations.

In the case of New York Central R. R. Co. v. United States (265 U. S. 41), Mr. Justice Butler, in construing the acts of Congress and the orders of the Commission thereunder, held that the acts of Congress should be liberally construed in order to relieve brakemen of the labor and danger involved in the use of hand brakes to control the speed of trains and to promote the safety of trains and the persons and property thereon, and that it was the intent of Congress and the Commission, as soon as practicable, to require all cars to be equipped with power brakes (11 I. C. C. 429).

In other words, the acts of Congress, as interpreted by this Court and the Interstate Commerce Commission, intend that the speed of trains should be controlled with power or train brakes, operated by the engineer, instead of by hand brakes operated by brakemen upon freight trains. Congress has thus occupied the field and determined, under the Commerce Clause of the Constitution, what is the safest way in which to operate trains engaged in interstate commerce, and this does not leave the question open for state legislation and police regulations to determine that extra brakemen shall be employed to operate hand brakes at all. Under the federal legislation they are no longer used in the operation of freight trains.

And by Section 1 of the Transportation Act the Interstate Commerce Commission has been given exclusive jurisdiction to regulate "the supply of trains."

In re Train Service on Northern Pacific, 112 I. C. C. 191.

Arkansas Laws in Conflict With Sections 13 and 15 of Transportation Act of 1920.

That the decision of the three-judge court, holding that the Commission could not go into the question of cost where state laws required the expenditure, is not the law, is evidenced by the recent decision of this Court in Lehigh Valley R. Co. v. Commissioners (278 U. S. 34), where Mr. Chief Justice Taft for this Court, after citing the case of Erie R. R. v. Board (254 U. S. 394), said:

> "This is not to be construed as meaning that the danger to the public would justify great expenditures reasonably burdening the railroad when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. * * * We emphasize this, not because there is doubt about it, but because we deprecate the impression, apparently entertained by some, that in the safeguarding of railroad crossings by order of state or local authority, the exercise of police power escapes the ordinary constitutional limitations of **reasonableness of cost.** * * * It was certainly not intended by the Transportation Act to take from the states, or to thrust upon the Interstate Commerce Commission, investigation into parochial matters like this, unless, **by reason of their effect on economical management and service, their general bearing is clear.**"

Mr. Justice McReynolds dissented from the majority opinion in the Lehigh Valley case upon the ground that the Board of Public Utilities had no authority to impose

a charge of $100,000 upon the railroad under the pretense of objecting to a six per cent curve in a country road, and that such order was a plain abuse of power.

Both from Mr. Justice McReynold's opinion in the Lehigh Valley case and from the majority opinion, it is clear that the Interstate Commerce Act, as properly interpreted, vests in the Interstate Commerce Commission, and solely in that administrative body, the right to set aside such expenditures as the Arkansas Full Crew Laws entail upon the railroads of the state as uneconomical and unreasonable, and in violation of the Car Service Section of the Transportation Act.

In C. St. P. M. & O. R. Co. v. Hollenberg (282 U. S. 162), under a statute of Nebraska, the railroad company was required to construct an underground cattle pass across its right of way, in order to save the farmer from inconvenience of using an existing grade crossing.

The railroad company contended that this statute confiscated the defendant's property without due process of law. The Commission had not found that the grade crossing was inadequate or dangerous.

In reversing the decision of the Supreme Court of Nebraska (115 Neb. 727), upholding the State Commission's order, Mr. Justice Stone, for this Court, said:

> "It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for

the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is the taking of property without due process of law forbidden by the Fourteenth Amendment."

C. St. P. M. & O. R. Co. v. Hollenberg, 282 U. S. 167.

In speaking upon the Transportation Act, when it was before the Senate of the United States, the late Senator Cummins, on December 11, 1919, in the Senate of the United States, said:

"I realize that if railway companies should attempt to pay their employes an excessive compensation—so excessive as to be obviously wrong, and if the Transportation Board, which is given jurisdiction over the Regional Boards of Adjustment and the Committee of Wages and Working Conditions, do not correct that evil, then we must take measures to correct it."

Congressional Record, Vol. 59, Part 1, page 396.

Senator Robinson, speaking on the Conference Committee Bill, with reference to section 422, also said:

"Honest and economical management and expenditures constitute an important and controlling consideration. * * * The provision gives due considera-

tion to the necessity for honest and economical management. * * * The decision in Wilson v. Newell (243 U. S. 35) expressly affirms the power of Congress to fix wages or the standard for determining them in case of disputes between railroads and their employes and to provide for appropriate legislation for compulsory arbitration."

Congressional Record, Vol. 59, Part 4, pages 3331, 3334.

Decision of the Three-Judge Court Is In Conflict With Many Decisions of This Court.

In the case of

Hammer etc. v. Dagenhart, 247 U. S. 251,

the Court held:

"The power to regulate interstate commerce is the power to prescribe the rule by which the commerce is to be governed; in other words, to control the means by which it is carried on."

In the case of

M. K. & T. Ry. Co. v. State of Texas,
245 U. S. 484,

the Court held:

"Where, in regular course, a passenger train is moved by one company from one state to a point in another and is there taken charge of and carried to

destination by a second company, local to the second state, it is manifestly erroneous to hold that its interstate character is lost because the second company employs new crews and engines and cannot go beyond the state line.

"An order of the Texas Railroad Commission requiring passenger trains in the state to leave stations on advertised schedule time, and allowing them no more than thirty minutes at origin or points of junction to make connection with trains of other lines, or ten minutes more if at the end of the thirty minutes the connecting trains are in sight, is an unjustifiable interference with interstate commerce as applied to a local railroad company in respect of an interstate train which, under contract, the company receives at a point within the state line from a connecting company and forwards (in sections) to its destinations within the state."

In the case of

Railroad Co. v. Public Service Commission,
250 U. S. 566,

the Court said:

"As applied to an interstate train terminated by a mail car, the law of Pennsylvania (Laws 1911, p. 1053, Sec. 7) forbidding the operation of any train consisting of United States mail, or express cars, without the rear end of the rear car being equipped with a platform of thirty inches in width, with guard rails and steps, invades a subject of regulation fully occupied by Congress through the rules of the Post-

master-General respecting the construction of mail cars and their equipment when used as end cars, and under the commerce clause, as is evinced by the Safety Appliance Act and regulations of the Interstate Commerce Commission thereunder, particularly those permitting the employment of caboose cars, which are constantly used as end cars, without platforms."

In the case of

Charleston & Co. R. R. v. Vernville Co.,
237 U. S. 597,

the Court held:

"A state law not contrived in aid of the policies of Congress, but to enforce a policy of the state differently conceived, cannot be said to be in aid of interstate commerce.

"When Congress has taken the particular subject matter in hand, coincidence of a statute is as ineffective as opposition, and a state law on the same subject cannot be sustained as a help to the federal statute because it goes farther than Congress has seen fit to go.

"A state statute which is a burden on interstate commerce is not saved by calling it an exercise of police power."

In the case of

Texas & Pacific Ry. v. Rigsby,
241 U. S. 33, 38,

the Supreme Court of the United States said:

"In **Southern Ry. v. United States**, 222 U. S. 20, it was held that the 1903 amendment enlarged the scope of the original act so as to embrace all cars used on any railway that is a highway of interstate commerce, **whether the particular cars are at the time employed in such commerce or not.** The question whether the legislation as thus construed was within the power of Congress under the commerce clause was answered in the affirmative, the Court saying (p. 27):

"'Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: **Both classes of traffic are at times carried in the same car,** and when this is not the case the **cars in which they are carried are frequently commingled in the same train** and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; **and the situation is much the same with trainmen,** switchmen and like employes, for they **usually, if not necessarily, have to do with both classes of traffic.** Besides, **the several trains on the same railroad are not independent in point of movement and safety, but are interdependent,** for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to **impede the progress** and **imperil the safety or other trains.** And so the absence of appropriate safety appliances from any part of any

train is a menace not only to that train but to others.'

"In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employes and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, **irrespective** of the use made of any particular car at any **particular time. Congress having entered this field of regulation,** it follows from the paramount character of its authority that state regulation of the subject matter is excluded (**Southern Ry. v. R. R. Comm. Indiana,** 236 U. S. 439)."

In the case of

Alabama & Vicksburg v. Jackson & Eastern,
46 Sup. Ct. Rep. 536-537,

the Supreme Court said:

"While none of the amendments in specific terms confer upon the Commission exclusive powers over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

* * * * * * *

"The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so shows that the jurisdiction of the Commission over

such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction" (45 Sup. Ct. Rep. 536-537).

In the case of

South Covington Ry. Co. v. Covington,
235 U. S. 537-8,

the Court held:

"An uninterrupted transportation of passengers between states on the same cars, under practically the same management and for a single fare, constitutes interstate commerce, although the track in each state is owned by a separate corporation.

"Regulations in the ordinance involved in this case as to number of cars to be run and the number of passengers allowed in each car between interstate points directly affect and are a burden on interstate commerce and void under the commerce clause of the Federal Constitution."

In the opinion, page 548, the Court said:

"We need not stop to consider whether Congress has undertaken to regulate such interstate transpor-

tation as this, for it is clearly within its powers to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

In

The Seaboard Air Line Ry. Co. v. Blackwell,
244 U. S. 310,

it was held:

"That provision of the 'Blow-post' Law of Georgia (Civil Code 1910, Sections 2675-2677), which requires railroad companies to check the speed of trains before public road crossings, so that trains may be stopped in time should any person or thing be crossing the track there, is a direct and unconstitutional interference with interstate commerce, as applied to the state of facts specifically pleaded by the defendant interstate carrier in this case, whereby it appears that, to comply with the requirement, the interstate train in question would have been obliged to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia, extending from Atlanta to the South Carolina line, and that more than six hours would thus have been added to the scheduled time of four hours and thirty minutes (**Southern Railway Co. v. King**, 217 U. S. 524, distinguished)."

In the conclusion of their brief appellees say:

> "Today we observe freight trains with as many as one hundred cars or more winding through the countryside," etc.

Of course, this is true in all the states through which the appellant operates, with the sole exception of the State of Arkansas. Does it not follow, with this admission from the appellees, that if freight trains **"with as many as one hundred cars or more"** can wind through the other states in the American Union, conveying to the markets the traffic from the countryside, this could be done as well in Arkansas with the low grades and improved roadbeds and tracks as well as in other states if it were not for the Full-Crew and Full-Switching-Crew Laws complained of in this case?

This admission of the appellees shows the wisdom of Congress in embracing in the car service section of the Transportation Act of 1920 the provision giving the Interstate Commerce Commission exclusive jurisdiction over "the supply of trains," and it also justifies the wisdom in the Railroad Labor Act of 1926 requiring railroads and their employes to reach agreements touching "rules and working conditions," and the fact that agreements providing for one less brakeman and one less switchman in all the states through which the appellant operates than in the State of Arkansas have been entered into, as evidenced by the affidavits filed in this case, should conclusively es-

tablish that the same agreements could be made in Arkansas were it not for the laws complained of.

By virtue of these agreements in the other states the employes should be held to be estopped from contending that more than two brakemen or more than two switchmen are necessary in any state, and this should be conclusive against the appellees; that the laws complained of are inconsistent both with the car service section of the Act to Regulate Commerce and the provisions of the Federal Railroad Labor Act of 1926.

Wherefore, it is contended that the decision of the Three-Judge Court should be reversed, with directions to grant the injunction prayed for against the Arkansas statute complained of.

Respectfully submitted,

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